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IN THE

Supreme Court of the United States

October Term, 1958.

No. 147.

IRENE HILL, Administratrix of the Estate of BENJAMIN HILL, Deceased,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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INDEX.

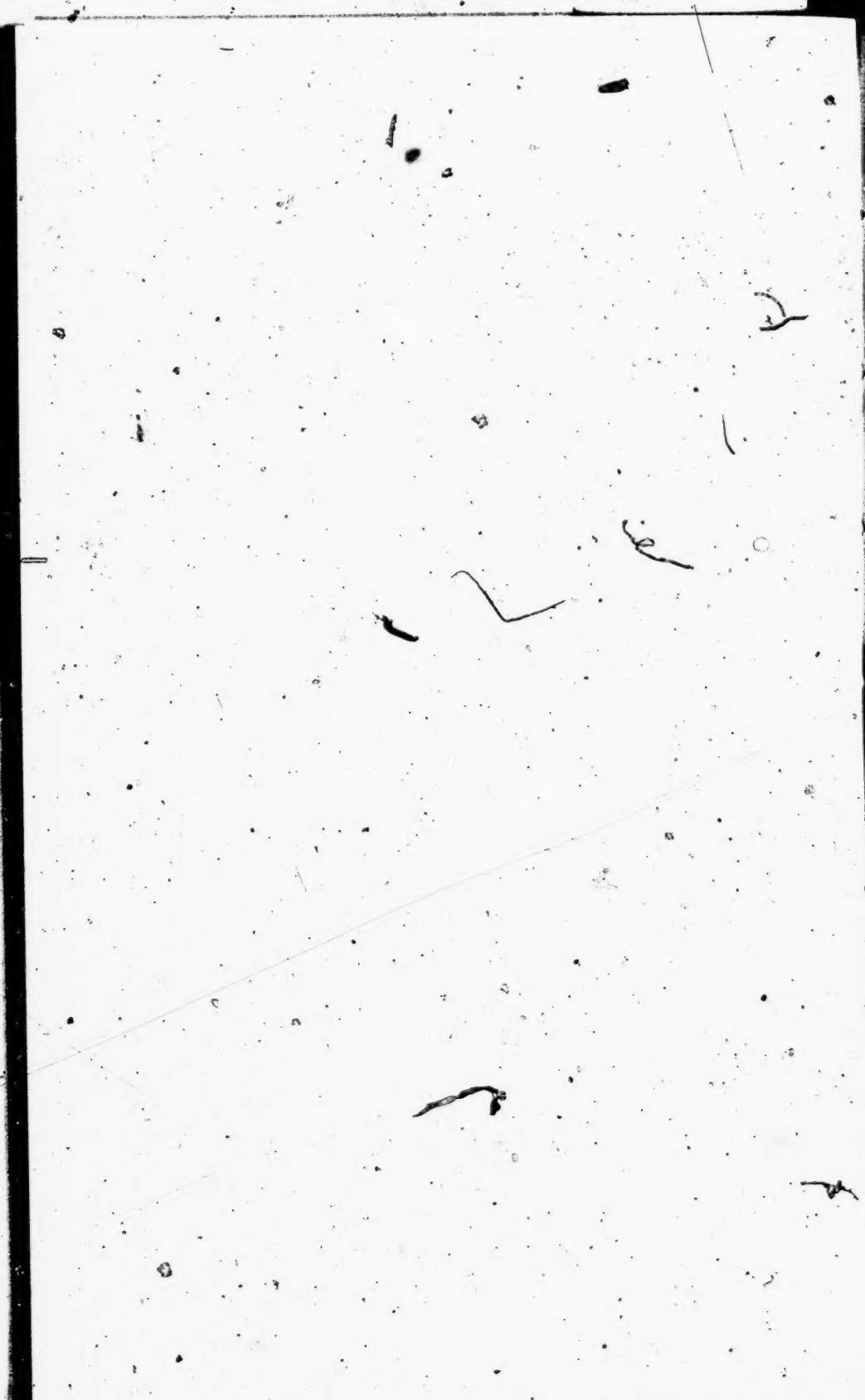
	Page
OPINIONS BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
ARGUMENT	3
I. No Conflict Exists Between the Decision of the Court Below and the Prior Decisions of This Court, Which Have Consistently Followed the Rule That Admiralty Courts, When Invoked to Protect Rights Rooted in State Law, Apply the Substantive Law of the State	3
II. The Pennsylvania Death Act Created a New Cause of Action, Rather Than a Remedy for an Existing Cause of Action	6
CONCLUSION	9

TABLE OF CASES CITED.

	Page
Centofani v. Pennsylvania R. Co., 244 Pa. 255 (1914)	8
The Corsair, 145 U. S. 335 (1891)	14
Curtis, Admr. v. Garcia, 241 F. 2d 30 (C. A. 3, 1957)	5
Erie R. Co. v. Tompkins, 304 U. S. 64 (1938)	3, 6, 10
Fisher v. Hill, 368 Pa. 53 (1951)	9
Garrett v. Moore-McCormack Co., 317 U. S. 239 (1942)	3, 10
Gaydos v. Domabyl, 301 Pa. 523 (1930)	8
Graham v. A. Lusi, Ltd., 206 F. 2d 223 (CA 5, 1953)	5
Grant v. Phila. B. & W. R. R. Co., 215 Pa. 265 (1906)	8
Halecki v. United New York & New Jersey S. H. P. Ass'n., 251 F. 2d 708 (1958)	4, 5, 6
The Hamilton, 207 U. S. 398 (1907)	4
The Harrisburg, 119 U. S. 199 (1886)	4
Hartford Accident & Indemnity Company v. Gulf Refining Company, 230 F. 2d 346 (CA 5, 1955)	5
Hucaluk v. Clyde Realty Co., Inc., 378 Pa. 169 (1954)	8
Just v. Chambers, 312 U. S. 383 (1940)	4
Kaczorowski v. Kalkosinski, 321 Pa. 438 (1936)	8
Kasanovich v. George, 348 Pa. 199 (1943)	8
Lee v. Pure Oil Company, 218 F. 2d 711 (CA 6, 1955)	5
Levinson v. Deupree, 345 U. S. 648 (1953)	4
Minkin v. Minkin, 336 Pa. 49 (1939)	9
O'Leary v. United States Lines Co., 215 F. 2d 708 (1954)	4, 5
P. R. R. Co. v. Zebe, 33 Pa. 318	8
Pickle v. Trimmel, 93 F. Supp. 823 (E. D. Pa., 1950)	8
Pope & Talbot, Inc. v. Hawn, 346 U. S. 406 (1953)	4, 5, 6, 9
Potter Title & Trust Co. v. Petcoff, 122 Pa. Super. Ct. 540 (1936)	8
Regan v. Davis, 290 Pa. 167 (1927)	8
Shambrach v. Middle Creek Elec. Co., 232 Pa. 641	8
Stegner v. Fenton, 351 Pa. 292 (1945)	8, 9
Western Fuel Co. v. Garcia, 257 U. S. 233 (1921)	3, 10
Pezzulli v. D'Ambrosia, 344 Pa. 643 (1942)	9

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
Pennsylvania Death Act (Act of April 15, 1851, P. L. 674, 12 Purdon's Statutes, Section 1601, as amended by the Act of April 26, 1855, P. L. 309, 12 Purdon's Statutes, Section 1602)	2, 6, 7
Title 28, U. S. Code, Sections 1254(1), 2101(c)	1



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 147.

IRENE HILL, ADMINISTRATRIX OF THE ESTATE OF BENJAMIN HILL, DECEASED,

Petitioner,

v.

WATERMAN STEAMSHIP CORPORATION,

Respondent.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The unreported judgment of the District Court for the Eastern District of Pennsylvania appears in petitioner's appendix in the court below at page 12a. The opinion of the United States Court of Appeals for the Third Circuit is reported at 251 F. 2d 655, and is printed at pages 15 and 16 of the appendix annexed to the petition.

JURISDICTION.

The jurisdiction of this court to review the final judgment of the United States Court of Appeals for the Third Circuit is provided by Sections 1254(1) and 2101(c) of Title 28, U. S. Code.

QUESTION PRESENTED

Where a longshoreman is killed as a result of a maritime tort involving his own contributory negligence aboard respondent's vessel in navigable waters of a state, does not the substantive law of the state which bars recovery in event of the decedent's contributory negligence apply to the action brought by his widow solely upon the authority of the state-created wrongful death statute?

STATEMENT OF THE CASE.

Petitioner recovered substantial damages as personal representative of the estate of the decedent, a longshoreman who was fatally injured in an accident determined by the jury to have resulted partly from the respondent's failure to furnish him with a safe place to work and partly through his own contributory negligence, which they found amounted to 40%. Petitioner's recovery under the Pennsylvania Survival Act, reduced by the proportion of decedent's contributory negligence, was not disturbed by the courts below, and has been paid by the respondent.

The trial judge set aside petitioner's award arising from her cause of action under the Pennsylvania Death Act (Act of April 15, 1851, P. L. 674, 12 Purdon's Statutes, Section 1601, as amended by the Act of April 26, 1855, P. L. 309, 12 Purdon's Statutes, Section 1602), on the ground that this cause of action was a state-created right, not rooted in the federal maritime law and subject to the substantive law of Pennsylvania under which contributory negligence of the decedent operates as a bar to recovery of damages. This judgment was affirmed by the United States Court of Appeals.

ARGUMENT.

I. No Conflict Exists Between the Decision of the Court Below and the Prior Decisions of This Court, Which Have Consistently Followed the Rule That Admiralty Courts, When Invoked to Protect Rights Rooted in State Law, Apply the Substantive Law of the State.

The petitioner is asking this court to repudiate the rule established by *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938) that causes of action based on state law must be interpreted in the federal courts according to the prevailing substantive law of the state. Referring to the *Erie* case, this court in *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 245 (1942) expressly included admiralty proceedings within the scope of that doctrine:

> "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. And admiralty courts, when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the State."

In *Western Fuel Co. v. Garcia*, 257 U. S. 233, 242 (1921), the court said:

> "As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters *within a State whose statutes give a right of action on account of death by wrongful act*, the admiralty courts will entertain a libel in personam for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the speci-

fied modification of or supplement to the rule applied in admiralty courts, *when following the common law*, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations. Southern Pacific Co. v. Jensen, 244 U. S. 205." (emphasis added).

A Delaware statute allowing the widow or personal representative of a decedent to recover damages for the wrongful death of a person killed on a vessel owned by a Delaware corporation was held to be enforcible in admiralty, applying the "full benefits of the statute" in granting relief. *The Hamilton*, 207 U. S. 398 (1907).

It has been expressly decided that no suit for wrongful death would lie "in the courts of the United States under the general maritime law." *The Harrisburg*, 119 U. S. 199, 213 (1886); *The Corsair*, 145 U. S. 335, 344 (1891); *Just v. Chambers*, 312 U. S. 383, 388 (1940). In order to obtain such benefits, the state law must be invoked and the substantive law of the state must be accepted in applying these state-created rights. *Levinson v. Deupree*, 345 U. S. 648, 651 (1953). So far as petitioner's action for wrongful death is concerned, her rights are clearly "rooted in state law" rather than in admiralty. The decision of the court below is entirely consistent with the pertinent decisions of this court.

Petitioner seeks review on the additional ground that there is a conflict of opinion between the Third Circuit and the First and Second Circuits on this issue. See *O'Leary v. United States Lines Co.*, 215 F. 2d 708 (1954), and *Halecki v. United New York & New Jersey S. H. P. Ass'n.*, 251 F. 2d 708 (1958), certiorari granted and presently pending. Both of these cited decisions rely on the proposition that *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953), holding that the rights of a maritime worker *injured* on a vessel within the navigable waters of Pennsylvania were controlled

by the general maritime law, including the rule of comparative negligence in determining his damages, suggested the need for similar modification of prior law in applying wrongful death statutes. This disagrees with prior decisions in the Fifth Circuit: *Graham v. A. Lusi, Ltd.*, 206 F. 2d 223 (CA5, 1953), *Hartford Accident & Indemnity Company v. Gulf Refining Company*, 230 F. 2d 346 (CA5, 1955), and in the Sixth Circuit: *Lee v. Pure Oil Company*, 218 F. 2d 711 (CA6, 1955). The Third Circuit followed its own recent decision in *Curtis, Admr. v. Garcia*, 241 F. 2d 30, 36 (C. A. 3, 1957), recognizing the distinction between state "survival" acts which preserve to a personal representative the decedent's personal maritime cause of action, and state "death" acts which create new and different rights of action non-maritime in character.

In *Halecki, supra*, the Second Circuit agreed with dictum in *O'Leary*, supra, which in turn was based on an assumption derived from dictum in *Hawn, supra*, that it would be "incongruous" to hold in conformity with *Hawn* that damages for injuries "short of death" were measured by maritime law, but that substantive state law determined the rights of the parties "in the ultimate consequence of death." This conclusion is correct if limited to the decedent's own right of action, whether he asserts it while alive as in *Hawn* or by his personal representative after death as in *O'Leary*. In that situation, his maritime cause of action passes to his personal representative. The state created the remedy, but not the right.

Although both *O'Leary* and *Halecki* conceded that recovery under wrongful death statutes would have been governed by substantive state law prior to the *Hawn* decision, they assume that the law has been altered by the dictum in *Hawn* that "even if Hawn were seeking to enforce a state created *remedy* for this *right*, federal maritime law would be controlling." (emphasis added). The fact that the right of action extended to shore workers under *Hawn* is an extension of the seaman's right under general mari-

time law, whereas the widow's right of action to recover for the wrongful death did not exist in general maritime law or at common law, is completely ignored.

Mere incongruity in result cannot outweigh the difference in the derivation of these rights; for that matter, it would be more incongruous to repudiate the doctrine of *Erie R. Co. v. Tompkins, supra,* in a situation where it clearly applies. Since the First and Second Circuits have incorrectly used *Pope & Talbot, Inc. v. Hawn, supra,* as the basis for judicial legislation not justified by any language of that decision, on an entirely separate issue, and in disregard of the established policy of this court to apply substantive state law to rights created or governed by state law, even in admiralty, their conflict of opinion with the Third, Fifth and Sixth Circuits is not sufficient to justify review by this court. Certiorari has been granted in *United New York, et al. v. Halecki,* to review the decision of the Second Circuit applying the comparative negligence principle in an admiralty suit brought under the Wrongful Death Act of New Jersey, as one of several questions presented. Others involve the extension of the seaworthiness warranty to a shoreside electrician working for a subcontractor while the vessel is in drydock, and the scope of the jury's right to draw inferences in the complete absence of probative facts. Thus, the only question involved in the present petition is already before this court in conjunction with more substantial issues.

II. The Pennsylvania Death Act Created a New Cause of Action, Rather Than A Remedy For An Existing Cause of Action.

Respondent submits that there is no substance to the petitioner's contention that the Pennsylvania Death Act, *supra,* provided a new remedy rather than a new right or cause of action. This distinction is fundamental to the merits of the present petition in view of the following comment in *Pope & Talbot, Inc. v. Hawn, supra,* at page 409.

"His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling."

The Pennsylvania Death Act of 1851, 12 Purdon's Statutes, Section 1601, provides as follows:

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his life, the widow of such deceased, or if there be no widow, the personal representatives may maintain an action for and recover damages for the death thus occasioned."

The amending Act of 1855, 12 Purdon's Statutes, Section 1602, removed the right of the personal representative to bring suit in such cases, and designated the "husband, widow, children, or parents" as the persons entitled to recover, and directed that the sum recovered should go to them in the proportion they would take the decedent's estate in case of intestacy.

The Act of 1851 and its 1855 amendment "created a new right of action." *Howard v. Bell Telephone Co.*, 306 Pa. 518 (1932). The court stated (at page 523):

"Therefore, while the right of action given by the statute to the widow is a new one, it is dependent upon the existence of a right of action in the husband at the time of his death. The statute cannot be construed to give the widow a greater right than the husband would have if living."

The court consequently held that the widow's right under the Death Act was barred because the statute of limitations had extinguished the husband's personal right of action. Similarly, the widow's right is barred by the

contributory negligence of the deceased, which would have barred his own recovery under Pennsylvania common law. *Hucaluk v. Clyde Realty Co., Inc.*, 378 Pa. 169 (1954); *Kasanotich v. George*, 348 Pa. 199 (1943); *Pickle v. Trimmel*, 93 F. Supp. 823, 825 (E. D. Pa., 1950); *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 440 (1936); *Grant v. Phila. B. & W. R. R. Co.*, 215 Pa. 265 (1906).

The Pennsylvania statute is an adaption of Lord Campbell's Act in England, and is similarly construed. See *Kaczorowski v. Kalkosinski, supra*, at page 441, where the court noted that "actions for death were unknown at common law * * * and, *as the right to recover therefor is purely a creation of statute, we have frequently stated that it is a new cause of action*: P. R. R. Co. v. Zebe, 33 Pa. 318; Shambrach v. Middle Creek Elec. Co., 232 Pa. 641. It was intended to create a new right and to compensate for a loss independent of that suffered by the deceased. The distinction between it and the action which the deceased could have commenced is emphasized by the fact that there are different measures of damages for the two actions." (emphasis added).

This distinction is further emphasized by the subsequent ruling of the Pennsylvania Supreme Court that two different periods are to be applied for limitation of the actions, enforcing the statutory limit of one year upon wrongful death suits and allowing two years for actions under the "survival" statute. *Stegner v. Fenton*, 351 Pa. 292 (1945).

Potter Title & Trust Co. v. Petcoff, 122 Pa. Super. Ct. 540 (1936), holding that at common law there was no *right* in any one to recover damages for the death of another and that the common law rule was abrogated by the Acts of 1851 and 1855, stated (at page 544): "These acts altered the common law and created a new cause of action." See *Centofani v. Pennsylvania R. Co.*, 244 Pa. 255, 260 (1914); *Regan v. Davis*, 290 Pa. 167, 171 (1927); *Gaydos v. Domabyl*, 301 Pa. 523, 529 (1930).

In *Minkin v. Minkin*, 336 Pa. 49, 51 (1939), the court speaks of the Death Act as "creating a new right" for which the common law furnished no redress. In the leading case of *Pezzulli v. D'Ambrosia*, 344 Pa. 643, 647 (1942), the Death Act is described as "a cause of action unknown to the common law." *Stegner v. Fenton, supra*, says that the statute "provided for a cause of action unknown to the common law."

These declarations by the appellate courts of Pennsylvania make it abundantly clear that the wrongful death statute created a new right or cause of action, and not merely a new remedy to enforce a right previously existing. Petitioner at pages 11 and 12 of her brief cites a passage from *Fisher v. Hill*, 368 Pa. 53, 58-60 (1951), as dispositive of the proposition that the "cause of action" is the negligent act. That case dealt with the simple procedural question of combining a wrongful death action with a survival action, and went no farther than to hold that the rights of action or claims arose from the same negligent act of the defendant and must be joined in bringing suit to avoid circuity of action. Petitioner's attempt to convert this language into an argument for applying admiralty principles to a state-created cause of action is an exercise in semantics which contradicts the conclusions of the Pennsylvania appellate courts.

CONCLUSION.

It is respectfully submitted that the petitioner is not entitled to a greater recovery than she has already received. Her wrongful death action is rooted in state law, and, since it is not remedial but a state created cause or right of action, it is subject to the common law contributory negligence rule. Any change in the law is the province of the state legislature.

Petitioner's rights were not enlarged by the decision of this court in *Pope & Talbot, Inc. v. Hawn, supra*, and to reach any other conclusion would repudiate the well-

established doctrine of *Erie R. Co. v. Tompkins*, *supra*, as extended to admiralty jurisdiction in *Western Fuel Co. v. Garcia* and *Garrett v. Moore-McCormack Co., Inc.*, *supra*. The petition should accordingly be dismissed.

Respectfully submitted,

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